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No. 02-891

In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

Although the Solicitor General recommends that this Court grant certiorari to review the Seventh Circuit's decision below (see U.S. Br. 16), he fails to respond to our explanation for why review is unnecessary.

1. The Solicitor General barely engages our argument (Br. in Opp. 9-13) that there very well may not be a circuit split at all on the question whether changes in the rules governing the suspension of early retirement benefits violate ERISA. First, he does not dispute that the Sixth Circuit's comments on the question in *Whisman* v. *Robbins*, 55 F.3d 1140 (1995), are dicta. See Br. in Opp. 7 n.2. Second, while the Solicitor General may be correct in claiming that the panel of the Fifth Circuit that decided *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), believed that its decision "was *not* in tension with that court's earlier decision in [*Harms* v. *Cavenham Forest Industries, Inc.*, 984 F.2d 686 (5th Cir. 1993)]" (U.S. Br. 14) (emphasis in U.S. Br.), that is not the relevant question. Rather, the appropriate inquiry is whether a panel of the Fifth Circuit in the future would be bound by *Spacek*. As we have explained, the *Spacek* court's decision is not binding, because its analysis is inconsistent with the Fifth Circuit's prior decision in *Harms*. See Br. in Opp. 10-11; Robert B. Lamb, *Early Retirement Benefits and the Arbitrary and Capricious Standard Under ERISA in* Spacek *v.* Maritime Ass'n, 32 CREIGHTON L. REV. 1721, 1748-1749 (1999) ("*Harms* would support Spacek's argument that [section 204(g)] shields him from subsequent amendments."). Thus, there is no circuit split to justify this Court's review.

2. Relying entirely on the say-so of one of the *amici*, the Solicitor General asserts that this case "has substantial recurring importance." U.S. Br. 15. But wishing does not make it so. As we explained in our Brief in Opposition (at

13), ERISA contains a "substantial business hardship" exception (ERISA § 302(c)(8)), which exists precisely to protect a plan in situations where a plan's financial stability is threatened by, among other reasons, some detail of the plan – including its suspension-of-benefits rules. But unless a plan invokes this exception, ERISA protects defined-benefit plan members from *ex post* changes, and instead puts the risk of excessive costs on the employers.

The claim of importance is also belied by the fact that this issue has been litigated with great infrequency since the anti-cutback rule was extended to early retirement benefits by the Retirement Equity Act of 1984 (see Pub. L. No. 98-397, § 301(a)(2), 98 Stat. 1451). To the best of our knowledge, the question has reached the courts of appeals on only three occasions – in this case, in *Spacek*, and in *Whisman* – in almost twenty years. Thus, the question cannot have substantial recurring importance.

Finally, the fact that a few pension funds may be subject to the jurisdiction of both the Fifth Circuit and the Seventh Circuit (see U.S. Br. 16) is also not sufficient to make this case an important one. In the computer age, the (putatively) different rules that apply in these two circuits could be implemented without any problem. In any event, it is trivially easy for a plan to behave in a manner that is lawful in both circuits; the plan merely needs to choose not to attempt to implement a retroactive modification in its early-retirement-benefit suspension rules.

3. On the merits, the Solicitor General has merely adopted the analysis of the *Spacek* court lock, stock, and barrel. See U.S. Br. 7-10. But again, we have already explained why that reasoning is flawed. See Br. in Opp. 15-18. Like the *Spacek* court, the Solicitor General insists on conflating two distinct questions: first, whether a pension fund may include rules that provide for the suspension of early retirement benefits for specified post-retirement

employment; and second, whether the pension fund may *change* those rules as they apply to individuals whose benefits have already vested. No one disputes that the first is allowed; that is the point of Representative Clay's floor comments, as well as of Internal Revenue Manual § 4.72.14.3.5.3(7). See Br. in Opp. 18; U.S. Br. 9. But the fact that a pension fund may be drafted to allow for the suspension of benefits does not mean that the plan should also be able to change those rules and apply them to beneficiaries whose benefits have vested and who have already retired. In fact, the Treasury regulation that the Solicitor General cites in his brief (at 13) stresses this very point:

> The addition of employer discretion or objective conditions with respect to a section 411(d)(6) protected benefit *that has already accrued* violates section 411(d)(6). Also, the addition of conditions * * * or any change to existing conditions with respect to section 411(d)(6) protected benefits *that results in any further restriction* violates section 411(d)(6).

26 C.F.R. § 1.411(d)-4 Q&A-7 (emphasis added).

When Messrs. Heinz and Schmitt chose to retire, they did so on the understanding that their pension fund provided them specified early retirement benefits. Those retirement benefits are defined not merely by the dollar sum to which they are entitled in any given month, but also by the rules that govern when they will receive benefit payments. An alteration in these rules "has the effect" of "reducing" (ERISA § 204(g)(2)) the value of these benefits, just as an alteration in the dollar amount of those benefits would reduce their value. Thus, the Seventh Circuit correctly held that petitioner violated ERISA by modifying its early-retirement rules.

4. Finally, if there were any doubt about whether to grant certiorari, an additional consideration supports denial: This case has been in limbo for the surprising seven months that it took the Solicitor General to file his brief. During that period the individual respondents have continued to be denied the pension income to which they are entitled. The case should therefore be brought to a quick resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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